

THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KAELI GARNER, *et al.*,

Plaintiffs,

v.

AMAZON.COM, INC., a Delaware
Corporation, and AMAZON.COM SERVICES
LLC, a Delaware Limited Liability Company,

Defendants.

) Case No. 2:21-cv-00750-RSL

)
) **PLAINTIFFS' REPLY IN SUPPORT OF**
) **MOTION TO COMPEL DEFENDANTS**
) **TO SEARCH FOR AND PRODUCE**
) **RESPONSIVE DOCUMENTS**

) NOTE ON MOTION CALENDAR:
) October 7, 2022

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Defendants' opposition to Plaintiffs' motion distorts the Parties' ESI negotiations and offers no substantive explanation why 36 custodians culled from their 1.6 million employees do not have information about the claims and defenses. Similarly, Defendants slyly shy away from arguing that any of the one million pages returned are irrelevant or can't be further culled using TAR. Instead, Defendants focus on (i) delay which they fostered by stringing out the meet-and-confer process and slow rolling document productions, and (ii) on chastising Plaintiffs for using all available information from scant discovery and public sources to identify custodians from each of the corporate partitions related to the recordings at issue and the use of data derived from those recordings.

I. ARGUMENT

A. Plaintiffs' Proposed Search Terms Are Relevant And Proportional.

Plaintiffs' proposed search terms are narrowly tailored to collect documents specifically sought by their Requests for Production. As an example, the following search string:

(awoke OR wake) W/25 (mistak* OR false OR misunderstand* OR uninten* OR early OR prematur* OR error OR fault OR confus* OR misinterpret OR misconstrue OR *noise* OR slip* OR complaint OR investigat* OR exam* OR probe OR inquir*)*

specifically addresses requests 2–4, 6, 10, 13, 19, 23, 32. ECF No. 114, Ex. A. at 2; Buell Declaration Ex. A. These requests seek information about how Alexa responds in the absence of wake words, communications about those responses, and related policies. ECF No. 116, Ex. J at 11–16. These requests go to the heart of Plaintiffs' claims and are clearly relevant and proportional to the needs of the case. Plaintiffs require this ESI to prove, inter alia, Defendants' intent and how Alexa functions. *See* Cal. Penal Code § 631; Cal. Penal Code § 632; Wash. Rev. Code Ann. § 9.73.030.

Similarly, the following search string:

(third OR developer OR skill OR manufactur* OR contractor*) W/10 (record* OR message* OR communicat* OR voice* OR audio* OR speech OR transcript* OR statement OR utterance OR announc* OR remark* OR exchange* OR request* OR interact* OR transfer* OR transmission OR content* OR input* OR history OR profile OR *data* OR document* OR *file*)*

1 directly addresses requests 9, 12, 13, 17, 26-31, 33, and 38-40 (ECF No. 114, Ex. A at 3) which
 2 seek information about Defendants' third-party contractors, the way in which such contractors
 3 received or access recordings, and whether Defendants notified Plaintiffs of the third-party review.

4 Further, the following search string is tied to requests 7-8, 11-12, 18, 25-26, 30, 31, and 33:

5 *(user* OR buyer OR customer OR consumer OR purchaser OR shopper OR client*
 6 *OR *register* OR speaker OR child* OR minor) W/15 (consen* OR agree* OR*
 7 *permit* OR permission OR approv* OR assent* OR authori* OR allow* OR*
 8 *comply OR complian* OR concur* OR subscrib* OR accept* OR decid* OR*
 9 *decision OR understand* OR transparen* OR grant OR yes) AND (transmission*
 10 *OR content* OR input* OR history OR profile OR *data* OR document* OR *file*)*

11 ECF No. 114, Ex. A at 4. They seek documents about consent or authorization to record and
 12 transmit recordings, an issue at the heart of this action.

13 In their opposition, Defendants do not, and cannot, argue that the proposed search terms,
 14 when read in their entirety, are not appropriately tailored. Instead, Defendants cherry-pick single
 15 terms or words out of proposed search strings. This approach is nonsensical. It is no different than
 16 arguing that a sentence or paragraph does not make sense by only pointing to certain words within
 17 it and ignoring the rest. ECF No. 124. Indeed, Defendants' **own** proposed search terms contain the
 18 same or similar "common" words such as "secret", "early", and "train." Defendants' effort to label
 19 Plaintiffs' search terms as overly broad because they use words Defendants call "common" fails.

20 Defendants never—in writing or otherwise—identified a search string in its entirety as not
 21 relevant. Nor can they do so, since Plaintiffs proposals referenced relevant requests for production
 22 and complaint paragraphs. ECF No. 114, Ex. A.

23 Defendants similarly insist that Plaintiffs' attempts to negotiate search terms were not made
 24 in good faith because the proposals did not remove any search terms. That argument fails. First,
 25 Plaintiffs repeatedly reduced the proximity of terms, which reduced the number of hits by a large
 26 percentage with each proposal. Second, Defendants concede that Plaintiffs' final offer removed a
 substantial number of search terms, but that just wasn't enough. Nonsense. Plaintiffs substantially

1 reduced their proposed search terms during the meet and confer process.

2 Defendants also grossly mischaracterize Plaintiffs’ good-faith efforts by failing to inform
 3 the Court that **Plaintiffs’ efforts to reach a compromise during the summer reduced the**
 4 **number of hits by 33%—a third of the original request.** Importantly, after Plaintiffs’ first
 5 proposed search terms, Defendants never made a genuine counterproposal; instead, they just
 6 rejected each of Plaintiffs’ compromises and reverted to a repackaged version of their original
 7 proposal. ECF No. 114, Ex. E. Defendants also wrongly argue that Plaintiffs failed to comply with
 8 the ESI Order’s “good faith explanation” provision. Not true. Over the course of four letters and
 9 over five email exchanges, Plaintiffs provided lengthy explanations of why their ESI proposals
 10 were appropriate. Defendants ignore all this. Plaintiffs’ significant efforts over five months was
 11 precisely what the ESI Order requires of a party.

12 Finally, Defendants’ assertion that Plaintiffs “falsely claim” that Defendants did not
 13 provide a counteroffer, (*see* ECF No. 124 at 5), is itself untrue. Defendants *never* meaningfully
 14 engaged with *any* of Plaintiffs’ ESI proposals, instead focusing on cherry-picked terms and
 15 insisting on extensive and unnecessary written correspondence. ECF No. 114, Ex. I at 2. And
 16 Defendants’ July 24, 2022 “proposal” was not a genuine counteroffer. It repackaged their first
 17 proposal with four “categories” of terms that Plaintiffs had counter-proposed themselves to
 18 Defendants’ previously proposed search strings, with no explanation of why Plaintiffs’ other
 19 suggested terms were inappropriate. As Plaintiffs had already rejected that proposal, it was not
 20 serious. Defendants are also wrong to argue that Plaintiffs’ counsel orally “represented that it was
 21 not their intention to have either side review a million or more documents.” ECF No. 124 at 1–2,
 22 3. Plaintiffs never made that assertion. In a complex nationwide class action like this one, it is not
 23 unusual for a party to collect and review more than one million documents.

24 **1. Defendants Do Not Identify Any Burden.**

25 Defendants’ argument that Plaintiffs’ proposed search terms are overly burdensome is
 26 conclusory and circular. Defendants claim, with no evidentiary support whatsoever, that adopting

1 Plaintiffs’ proposed search terms and adding custodians would impose an “extraordinary burden”
 2 and “disproportionate costs and burdens.” ECF No. 124 at 2, 6. These bare assertions—neither of
 3 which is supported by any declaration testimony—are the only references to burden in Defendants’
 4 entire brief. As this Court recently noted, the party resisting discovery must support their assertions
 5 of burden. ECF No. 123 at 4. Defendants have not even attempted to do so. *See also In re*
 6 *Diisocyanates Antitrust Litig.*, 2021 WL 4295729, at *10 (W.D. Pa. Aug. 23, 2021), *R&R adopted*,
 7 2021 WL 4295719 (W.D. Pa. Sept. 21, 2021) (“the large percentage of documents collected by the
 8 plaintiffs’ search terms, standing alone, is not meaningful”).

9 **2. Defendants Improperly Seek to Minimize the Scope of** 10 **Discovery.**

11 **First**, Defendants improperly cite to the Court’s Order partially granting Defendants’
 12 motion to dismiss. That Order did not substantially impact the scope of this case in terms of the
 13 discovery Plaintiffs need. The order primarily reduced which Plaintiffs can recover under which
 14 claims, which has no relevance whatsoever to the scope of discovery relevant to Plaintiffs’
 15 remaining claims. But the key issues about illegal recordings remains. For example, it impacted
 16 discovery requests based on the Stored Communications Act. *See* ECF No. 91 at 27–28.
 17 Defendants have not identified any such requests in opposing Plaintiffs’ motion.

18 At trial, Plaintiffs will show the jury, *inter alia*, that “(1) Amazon’s Alexa devices record,
 19 permanently store, use, and transmit to third parties (including human reviewers) communications
 20 in the absence of a wake word and (2) plaintiffs reasonably expected that the devices would
 21 respond to a question or command only if the wake word were used and that, in doing so, the
 22 question or command would be stored only long enough to process the communication and
 23 generate a response.” *See* ECF No. 91 at 1. Plaintiffs will also show “that Alexa devices are fully
 24 capable of functioning without the need to record, store, and/or share voice recordings.” *Id.* The
 25 search terms Plaintiffs propose are tailored to obtain discovery relevant to proving these claims.

26 **Second**, Defendants’ place outsized reliance on the Court’s model ESI protocol. The
 document doesn’t require parties to adhere to certain parameters, and because the Parties

1 negotiated a different ESI protocol, it does not serve as a baseline of reasonableness especially due
 2 to the unique needs of this case. The model is designed for a typical civil action and not a complex,
 3 nationwide class action involving potentially over one billion dollars in damages. It recognizes
 4 that by specifying that the “Search related numbers . . . may be sufficient in certain cases, but not
 5 in others.”¹ The model leaves it to the parties to “meet and confer to establish the appropriate . . .
 6 numbers based on the complexity, proportionality and nature of the case.” *Id.*

7 The parties agreed to the terms of the existing ESI protocol, not the model protocol, in
 8 recognition of the uniquely complex nature of this case. Rule 26(b)(1) requires the Court look to
 9 the needs of **this case** to determine whether Plaintiffs’ discovery requests are proportional. Fed. R.
 10 Civ. Proc. 26(b)(1).

11 **B. Plaintiffs’ Request To Add Custodians Is Proportional**

12 First, Plaintiffs’ proposed ESI custodians should be compelled because they are likely to
 13 have discoverable information, and Defendants fail to show otherwise. Amazon’s corporate
 14 structure requires that Defendants collect ESI from individuals in different teams to understand
 15 how the surreptitious recordings and data derived from those recordings is used, what policies exist
 16 regarding the use of those recordings and whether those policies vary from team to team, and
 17 similar issues key to Plaintiffs’ case. While Defendants steadfastly refuse to produce basic
 18 organizational charts, Defendants admitted in their previous motion to compel that “Amazon
 19 separates internal access to different types of data across different teams.” ECF No. 106 at 10. This
 20 concession justifies the custodians Plaintiffs propose beyond the few high level senior managers
 21 with only supervisory responsibilities Defendants put forward. ECF No. 124 at 1. Plaintiffs are
 22 entitled to the communications of the employees doing the work not just the sanitized
 23 communications of senior supervisors.

24 Second, Defendants try to impugn Plaintiffs’ proposed custodians by claiming they were

25 ¹U.S. Dist. Court W.D. Wash. Model ESI Agr.,
 26 <https://www.wawd.uscourts.gov/sites/wawd/files/ModelESIAgreement.pdf>.

1 “found by searching for names on the Internet.” ECF No. 124 at 10; *see also id.* at 1, 12. Not so.
 2 Plaintiffs identified their proposed custodians based on Defendants’ own documents, Rule 26
 3 disclosures, *as well as* publicly available information. ECF No. 114, Ex. D. at 1.

4 Third, Defendants argue—without elaboration or support—that adding custodians would
 5 “dramatically increase . . . the burden on Amazon.” ECF No. 124 at 6. Defendants offer no reason
 6 why adding the proposed custodians would constitute an “undue burden” in the context of a case
 7 of this scope and complexity. Defendants cannot even rely on deceptively large numbers in this
 8 instance, as they have not provided either Plaintiffs or the Court with **any hit report** for the
 9 proposed additional custodians. Accordingly, on this record, they have no basis to argue that the
 10 number of documents is going to increase at all, much less sixfold.

11 Finally, Defendants argue that Plaintiffs have failed to “show their proposed custodians
 12 have “unique, relevant, non-cumulative information.” ECF No. 124 at 12. But it is Defendants who
 13 are resisting discovery, and therefore have the burden of showing that Plaintiffs’ proposed
 14 custodians are irrelevant or cumulative. *Benanav v. Healthy Paws Pet Ins. LLC*, 2022 WL
 15 3587982, at *2 (W.D. Wash. Aug. 22, 2022) (“The party opposing discovery has the burden of
 16 showing that discovery should not be allowed, and also has the burden of clarifying, explaining
 17 and supporting its objections with competent evidence.”).

18 Defendants mischaracterize and exaggerate the timeline of discovery discussions leading
 19 to Plaintiffs’ request for additional custodians. As Defendants detail, the Parties engaged in
 20 prolonged discussions regarding discovery parameters. ECF No. 124 at 3–6. The parties engaged
 21 in multiple telephone conferences, followed by letter exchanges requested by Defendants,
 22 followed by delays in Defendants’ response. ECF No. 113 at 1 n.1. Plaintiffs were unable to
 23 determine the adequacy of Defendants’ proposed custodians until reviewing Defendants’ rolling
 24 document productions. Those productions were substantially delayed and contained a bare
 25 minimum of responsive material.

26 For the foregoing reasons, Plaintiffs request that the Court grant this Motion to Compel.

Respectfully submitted,

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/s/ Bradley S. Keller

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